82-442

Office - Supreme Court, U.S.
FILED
AUG 23 1982
ALEXANDER L. STEVAS,
CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

FRANK J. CALVO,

PETITIONER,

vs.

LOS ANGELES UNIFIED SCHOOL DISTRICT, et al.,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

FRANK J. CALVO
4312 Saugus Avenue
Sherman Oaks, California 91403
Telephone: (213) 784-7967

Pro Se for Petitioner

QUESTIONS PRESENTED FOR REVIEW

.1. Whether the District Court and the Ninth Circuit Panel had the responsibility and right (discretion) to decide issues of fact - including determining the intent of respondent-defendants, whether or not malice and bad faith existed, whether fraud existed in the school district's (respondent-def) attempt to circumvent the due process protection provided by Cal Ed Cd section 13443 and other sections of the California Education Code; or whether it was the responsibility of the trial court (jury) to decide such issues of fact after completion of discovery and submission of petitioner's evidence? The Ninth Cir Panel did not address itself to this issue, though the Ninth Cir Panel was fully briefed on this issue, and appears to have overlooked the fact that petitioner Calvo never had a trial of the merits of his case.

.2. Whether there are constitutional limitations upon the power of courts to decide an action without allowing a party to be heard on the merits, where the denial of petitioner Calvo's right to a trial on the merits raises substantial constitutional questions the gravity of which is accented by the fact that petitioner is seeking to avoid deprivation of his 14th Amendment Section 1 right to due process?

.3. Whether the Ninth Cir Panel should have ruled that petitioner won his case in 1974, because respondent-defs failed to respond to petitioner's REQUEST FOR ADMISSION OF FACTS as required by Federal Rules of Civil Procedure Rule 36(a)? And was it correct for the Ninth Cir Panel to disregard the Ninth Circuit Court of Appeals ruling in O'Campo v. Hardisty, 262 F. 2d 621, 625; 1 F. R. D. Serv. 2d 56 c. 33, Case 1 (9th Cir 1958) which held that a party must respond to another party's REQUESTS FOR ADMISSIONS OF FACT?

LIST OF OTHER PARTIES

The only other parties not listed in the caption are respondents:

Wm. B. Brown, Associate Superintendent of Personnel
Pat E. Turner, Associate Superintendent of Personnel
W.K. Fitt, Supervisor in Personnel
Frank Fittin, Supervisor in Personnel
Wm. B. Spaeter, Supervisor in Personnel
A.J. Shugg, Supervisor in Personnel
Robert T. Green, Personnel

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IN THE

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No._____

FRANK J. CALVO,

PETITIONER,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT, et al.,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

The petitioner, Frank J. Calvo, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on 27 May 1982.

OPINION BELOW

The Court of Appeals entered its Memorandum decision affirming the district court's summary judgment in favor of respondents on 27 May 1982. A copy of the memorandum is attached separately as Appendix B.

The Court denied petitioner's petition for rehearing and suggestion for rehearing en banc on 27 July 1982. A copy of the order is separately attached as Appendix C.

JURISDICTION

On 27 May the Court of Appeals entered judgment affirming the district court's summary judgment in favor of respondents. (App. B) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). No other petitioner is involved in this petition.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> Nor shall any person be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This case originated upon the filing of a complaint (App. D) in September 1973 by petitioner Calvo to redress the deprivation of property interest, to a science teaching position, without due process, under color of law, and for damages.

The district court entered summary judgment on January 28, 1981, in favor of respondents, a school district, and abused its discretion by ignoring, without giving reasons, the cross-motion of petitioner Calvo for summary judgment in his favor. In December 1980, the Magistrate calendared petitioner's cross-motion for consideration in February 1981, but the case was dismissed on January 27, 1981, tho later petitioner asked the district court to vacate its order. This motion was denied.

Petitioner appealed. The three Judge Panel of the Ninth Circuit affirmed the district court's summary judgment on 27 May 1982 by deciding a question of fact, viz., 'Was petitioner a probationary teacher?', a question that should have been decided by the trial court, including issues of whether fraud - malice - bad faith existed, after discovery is completed and submission of evidence. The petitioner never had a trial on the merits.

The Ninth Cir Panel ignored the issue raised and fully briefed by petitioner, that petitioner Calvo won his lawsuit in 1974 because respondents (defs) failed to respond to requests for admissions filed in 1974, thereby admitting all the allegations in the complaint which were contained as statements for admission in the Requests for Admission. (App. B) The district court likewise ignored this failure by respondents to comply with FRCP Rule 36(a), though petitioner fully briefed this matter in the cross-motion for summary judgment. Both the district court and the Ninth Circuit abused their discretion by not giving reasons for ignoring the issues presented before the 'table of contents' herein. Both courts were apprised of the questions presented. A timely petition for rehearing was denied on 27 July 1982, by the Ninth Circuit. (App. C)

The decision of the lower courts are unreported.

The district court's jurisdiction is founded on:

(1) the action arises under the Constitution of the United States, Article 5, Amendment 14, Section 1;

(2) jurisdiction is founded on the Act of June 25, 1948, c. 646, 62 Stat. 869, Title 28 U.S.C., Sections 1331 and 1343(3) and (4);

(3) the action arises under 42 U.S.C. Section 1983, Civil Rights Act of 1871.

4. REASONS FOR GRANTING THE WRIT THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND THIS COURT ON IMPORTANT ISSUES AFFECTING FEDERAL CONSTITUTIONAL RIGHTS

A. The Decision Below Affirms the Right of a Magistrate in a Summary Judgment Proceeding to Deprive a Plaintiff a Trial on the Merits Concerning Plaintiff's 14th Amendment Section 1 Right to Due Process and therefor Conflicts with the Decisions of other Circuits and this Court on this Matter.

The first issue presented in the petition broadly involves the scope of a Magistrate's authority and discretion to determine issues of fact before trial and before discovery is completed, where the issues of fact involve questions of malice, fraud, the intent of respondent-defs to circumvent the Cal Ed Cd Section 13443 (now section 44949), (App. A at A-3 & A-4), where the complaint alleges respondent-defs' fraud, malice, lying and other forms of corruption. (App. D, at p. D6, line 11; D7, lines 10-28; D8, lines 1-11)

Since Magistrates all over the United States are frequently confronted with this exercise of discretion, this Court should rule on the question 'Whether the Magistrate has the discretion to determine the issues of fact, supra, eliminating the trial court phase of a lawsuit.

The Ninth Cir Panel's decision conflicts with Leow's Inc. v. Bays, 209 F. 2d 610, 19 F. R. Serv. 56 c. 41, (CA 5th, 1954); Cram v. Sun Ins. Office, Ltd., 37t F. 2d 670, 11 F. R. Serv. 2d 56 c. 41, Case 1 (CA 4th, 1967) which held that a district court does not have the right, before trial on the merits, to draw inferences as to a party's good faith or purpose or intent in its wrongful acts, as the misbehaving party's intent and purpose raise genuine issues for the trial court's consideration; because it is at the trial, that the trier of the facts would be in a better position to ascertain and consider the truth in the lawsuit.

The summary judgment relates to pretrial procedures, and not to the merits of a plaintiff's case. A motion for summary judgment is granted not for lack of proof, but for lack of an issue.

Petitioner alleges fraud, malice and proximate cause in his complaint. (App. D, at p. D6, line 11; p. D7 at lines 10-28 and p. D8 at lines 1-11)

The Ninth Cir Panel's decision conflicts with Grass v. Southern Ry. Co., 414 F. 2d 292, 13 F. R. Serv. 2d 56 c, 41, Case 3 (CA 5th 1969), which held that cases raising issues of fraud, malice, proximate cause are peculiarly unsuited for summary judgment, since these issues require a determination of the reasonableness of actions under the circumstances of the case.

It is respectfully submitted that the Magistrate, in a summary judgment proceeding, and the Ninth Cir Panel, should not have taken it upon themselves to determine the issues of whether fraud, malice, bad faith existed; nor to determine questions of fact, such as, whether petitioner was a probationary teacher between September 1962 and June 1964, and again between September 1965 and February 1966, because these are questions to be determined by the trial court (jury), after all parties have submitted evidence.

Only a decision by this Court can resolve the first Question Presented For Review; thus eliminating the conflict between the Ninth Circuit Court's decision and those of other Circuits, and even this court. A grant of certiorari shall preserve uniformity of decision among circuits.

B. There are Constitutional Limitations Upon the Power of Courts to Decide an Action Without Allowing a Party to be Heard on the Merits

This Court held in Societe International Pour Participationes Industrielles et Commerciales, S. A. v. Rogers, 1958, 78 S. Ct. 1087, 1094, 357 U. S. 197, 209, 2 L. Ed. 2d 1255 that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to decide an action without allowing a party to be heard on the merits.

This denial of petitioner's trial on the merits raises substantial constitutional questions, the gravity of which is accented by the fact that petitioner Calvo is seeking to avoid deprivation of his 14th Amendment right to due process. Here, the petitioner invoked the aid of the lower courts to vindicate his 14th Amendment right to due process.; and is rather in the position of a defendant, since petitioner is challenging the government's (respondents') action by protesting against the deprivation or seizure of petitioner's teaching position and health. And petitioner is seeking the recovery of his teaching post and career, protected by the due process provided by Cal Ed Cd sec. 13443, and compensation for a permanent 'conversion reaction' illness resulting from the circumstances of petitioner's deprivation and denial of the 'due process'. Petitioner's 'teaching post' and 'health' were summarily taken away by the government (respondents) without the opportunity for protest by petitioner, claiming that the seizure was unjustified. To avoid prejudice of petitioner's 14th Amendment due process constitutional rights, the Court should grant certiorari.

C. In its Application of FRCP Rule 36(a) and (b), the Decision Below is in Conflict with its own Ninth Circuit's Decision in O'Campo v. Hardisty, 262 F. 2d 621, 625, (9th Cir 1958), in Conflict with the Decisions of Other Circuits and that of this Court.

Petitioner Calvo won his lawsuit in 1974, because respondents admitted all the allegations in petitioner's complaint. Two sets of REQUESTS FOR ADMISSION OF FACTS were filed - set on March 18, 1974, and another set on October 29, 1974, pursuant to the Federal Rules of Civil Procedure Rule 36. Respondents did not answer, did not deny, did not object to petitioner's two sets of REQUESTS FOR ADMISSION OF FACTS. Since respondents did not respond to the REQUESTS, the facts contained in the REQUESTS were thereby admitted under FRCP Rule 36(a). (App. A-1, A-2)

Under FRCP Rule 36(b), all facts admitted are conclusively established and need not be proved. (App. A-2, A-3) These facts, contained in the REQUESTS FOR ADMISSIONS, were and are the allegations in the complaint. Therefore, the allegations in the complaint are admitted as true by respondents. Petitioner won his lawsuit in 1974.

This was brought to the attention of the Magistrate at hearings in the spring of 1974 and again at the hearing on November 21, 1977. But the Magistrate refused to acknowledge petitioner's winning of this lawsuit, and rejected the contents of Rule 36.

In O'Compo v. Hardisty, supra, the Court held that failure of a party to answer an opposing party's request for admissions, admits the truth of all matters contained in the request. FRCP Rule 36, 28 U.S.C.

And the admissions in this case clearly show that the actions of respondents were not proper and gave rise to a cause of action. (App. D at ps. D1-D8 & D10-D12; & App. E at ps. E-1 thru E-35).

A review of the docket sheets will show that respondents did not respond to the request for admissions (App. F at ps. F-1 thru F-13)

It is respectfully submitted, the Ninth Cir Panel had no power to ignore or depart from a previous decision of the Ninth Circuit Court of Appeals. In re Jaylaw Drug, Inc., C.A. N.Y. 1980, 621 F. 2d 524; Miller v. San Sebastian Gold Mines Inc., CA Florida 1976, 540 F. 2d 307.

The Ninth Cir Panel's decision is in conflict with: Warren v. International Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, C.A. 8th 1976, 544 F. 2d 334; Adventures in Good Eating v. Best Places to Eat, C.C.A. 7th, 1942, 131 F. 2d 809; U.S. ex rel, Seals v. Wiman, C.A. 5th, 1962, 304 F. 2d 53, 63, certiorari denied, 1963, 83 S. Ct. 717, 372 U.S. 915, 9 L. Ed 2d 722, 83 S. Ct. 741, 372 U.S. 924, 9 L. Ed. 2d 729; City of Rome v. U.S., D.C.D. c. 1978, 450 F. Supp. 378, 383, affirmed 1980, 100 S. Ct. 1548, 446 U.S. 156, 64 L. Ed. 2d 119.

City of Rome held 'Rule 36(a) neither expressly nor implicitly excepts such facts from its requirements. Indeed, the rule expressly states that a party may not refuse to respond to a request merely on the ground that the matter for which an admission has been requested presents a genuine issue for trial.'

The Ninth Cir Panel's decision is in conflict with: Smyth v. Kaufman, C.C.A. 2d, 1940, 114 F. 2d 40, 130 A.L.R. 951; Batson v. Porter, C.C.A. 4th, 1946, 154 F. 2d 566; John Mohr & Sons v. Apex Terminal Warehouses, Inc., C.A. 7th, 1970, 422 F. 2d 638; Chicago, R.I. & P.R. Co. v. Williams, C.A. 8th, 1957, 245 F. 2d 397, certiorari denied, 78 S. Ct. 83, 355 U.S. 855, 2 L. Ed 2d 63; General Steel Prod. Co. v. Lorenz, D.C. Fla. 1962, 204 F. Supp. 518, affirmed C.A. 5th, 1964, 337 F. 2d 726; Mangan v. Broderick & Bascom Rope Co., C.A. 7th, 1965, 351 F. 2d 24, certiorari denied, 86 S. Ct. 930, 383 U. S. 926, 15 L. Ed. 2d 846; McSparran v. Hanigan, D.C. Pa. 1963, 225 F, Supp. 628, 636-637, affirmed, C.A. 3d, 1965, 356 F. 2d 983.

Only a decision by this Court, regarding the application and enforcement of its own Federal Rules of Civil Procedure Rule 36(a & b), can resolve the third Question Presented For Review thus eliminating the conflict within the Ninth Circuit, concerning its decisions, and avoiding future conflict between the Ninth Cir Panel decision and those of this Court, as well as those of other Circuits.

This third Question Presented For Review is substantial and important in the administration of FRCP Rule 36. Settlement of this question is in the public interest. Unequal treatment of petitioner under the FRCP Rules resulting soley from the lower Court's decision can be prevented only through the resolution and supervision by this Court of the third question presented herein. Thus great and grievious harm to petitioner can be avoided.

Apart from petitioner's personal interest, the issue is a continuing one affecting a very large number of cases as to the issue whether Rule 36 and other FRCP Rules need be complied with. In these circumstances, it is believed that it is in the interest not only of the lower court, but of the many

attorneys affected that the matter be definitely resolved at the earliest possible time.

The Ninth Cir Panel's decision affects the course of proceeding in a vast number of cases. To avoid resulting confusion is a matter of substantial importance meriting the granting of the Writ of Certiorari. The Court of Appeals opinion can fairly be characterized as an invitation to this Court to reconsider the applicability of FRCP Rule 36.

CONCLUSION

It is humbly and respectfully submitted that the present case is illustrative of persistent and serious misapplication of the law by the Court of Appeals for the Ninth Circuit in connection with an important phase of the judicial business of both that court and this Court. In far too many cases, the Court of Appeals for the Ninth Circuit, and the district court too, unjustifiably has been turning the appellate and district court process into an obstacle course for pro per litigants. Here, for example, at the time of filing this Petition for Certiorari in August or September 1982, already nine years have elapsed since petitioner Calvo's filing of the complaint in September 1973 (App. D); a mountain of papers has been filed (App. F at ps. F-1 thru F-13); but as yet petitioner has been unable to begin to obtain the trial court determination on the merits which he clearly is entitled to.

The course being followed by the district court and the Court of Appeals frustrates the sound and efficient administration of justice. In cases of this sort, the district court and the Court of Appeals treats 'in propria personas', like petitioner, in a manner which is unjust, discriminatory and unlawful. The lower courts' action threatens the effectiveness of private actions - pro per or pro se actions, as a vital means for correcting due process violations protected by the 14th Amendment. This Court alone can correct the situation, and correction is urgently needed. For the reasons which have been set forth, and because of the public importance of the issues

presented to pro se litigants as a class and to attorneys and their clients, certiorari should be granted.

Indeed, so clear is the error of the Court of Appeals, and so clearly improper and shockingly wrong the action of the district court, it is believed the appropriate relief would be the summary reversal of the decision, with a holding that the entire complaint is conclusively established due to respondents' failure to respond to Requests for Admissions under FRCP Rule 36.

The lower court decision withheld this lawsuit from the jury, which deprived petitioner of his right to a jury trial and decision; and in such situations as petitioner's, this Court consistently granted certiorari. Gibson v. Phillips Petoleum Co., 352 U.S. 874; Dick v. New York Life Ins. Co., 359 U.S. 437. In Wilkerson v. McCarthy, 336 U.S. 70-71, Mr. Justice Douglas justified the policy of the Court in granting review by certiorari, on the ground that 'the criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below, but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected.'

And in another case, the then Court majority said 'Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination.' Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 510; Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 116-117.

The same viewpoint was reflected in Beacon Theatres v. Westover, 359 U.S. 500, 501, where the Court granted certiorari because, quoting from Dimick v. Schiedt, 293 U.S. 474, 486, 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'

Here, petitioner respectfully invokes an exercise of this Court's power of supervision.

Dated: 4 August 1982.

Respectfully submitted,

FRANK J. CALVO
4312 Saugus Ave.
Sherman Oaks
California 91403
Telephone (213) 784-7967

Pro Se for Petitioner Calvo

Office-Supreme Court, U.S.
FILED
AUG 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-442

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PETITIONER,

vs.

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RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

APPENDICES FOR PETITIONER

at Clerk's request,

ALTERNATE ADDITIONAL APPENDICES

FRANK J. CALVO
4312 Saugus Avenue
Sherman Oaks, California 91403
Telephone: (213) 784-7967

Pro Se for Petitioner

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Pursuant to instructions of the Clerk of the Supreme Court of the United States, these Appendices are submitted as alternate and additional Appendices to conform in size to the printed Petition for Writ of Certiorari. Its content is less than the large xeroxed appendices. Please make use of the xeroxed appendices which are under one separate cover.

The Clerk gave permission to xerox the Magistrate's Report & Recommendation As To Civil Rights Complaint, which accompanies these appendices under a seperate cover.

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ENTERED
JANUARY 28, 1981

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANK J. CALVO,
Plaintiff,

NO. CV 73-2095-RJK (G)

v.

SUMMARY JUDGEMENT

LOS ANGELES UNIFIED
SCHOOL DISTRICT,
Defendant.

IT IS ADJUDGED that the motion for summary judgment of defendants is granted.
DATED: January 19, 1981

ROBERT J. KELLEHER
United States District Judge

FILED
JANUARY 27, 1981

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANK J. CALVO,
Plaintiff,

NO. CV 73-2095-RJK (G)

v.

ORDER

LOS ANGELES UNIFIED
SCHOOL DISTRICT,
Defendant.

Pursuant to 28 U.S., § 636 (b) (1) (B) and General Order No. 194, attached is the Report and Recommendation of the United States Magistrate who has reviewed the complaint filed herein and heard and considered defendant's motion for summary judgment.

The Court has reviewed the complaint, the file (including all documents related to the motion for summary judgment of defendant), and the attached Report and Recommendation of Magistrate Ralph J. Geffen, and plaintiff's objections thereto; the Court concurs with and adopts the Report and Recommendation as the opinion of the Court.

IT IS ORDERED that the motion for summary judgment of defendants is granted.

IT IS FURTHER ORDERED that the Clerk shall serve forthwith a copy of this order and the Magistrate's Report and Recommendation, and the Judgment herein, by United States mail, on the plaintiff and on the County Counsel, Los Angeles, California.

DATED: January 19, 1981

ROBERT J. KELLEHER
United States District Judge

CIVIL MINUTES — GENERAL

Case No. CV 73-2095-RJK Date: March 2, 1981
Entered
Mar. 23, 1981

Title: CALVO v. LOS ANGELES UNIFIED SCHOOL DISTRICT

Docket Entry: ENTERED MARCH 23, 1981

Present:
HON. ROBERT J. KELLEHER, JUDGE
James H. Haggard, Deputy Clerk

Attorneys Present for Plaintiffs: N/A
Attorneys Present for Defendants: N/A

A-3

Proceedings: MINUTE ORDER

Plaintiff having made a motion to vacate the Court's summary judgment granted in favor of defendants, the Court having taken the matter under submission, having considered the motion and the related papers on file and being fully informed, it is hereby ORDERED that plaintiff's motion is DENIED.

The Clerk shall send a copy of this Order to the parties.

Frank Calvo
4312 Saugus Ave.
Sherman Oaks, CA 91403

FILED
MAY 27, 1982

B-1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK J. CALVO,
Plaintiff-Appellant,

No. 81-5306

vs.

MEMORANDUM

LOS ANGELES UNIFIED SCHOOL DISTRICT; WILLIAM B. BROWN; PAT TURNER; W.K. FITT; FRANK FITTEN; WILLIAM B. SPAETER; A.J. SHUGG; ROBERT T. GREEN; FRANK KOSKI,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of California
The Honorable Robert Kelleher, Presiding
Argued and Submitted: March 1, 1982

Before: HUG, TANG AND PREGERSON, Circuit Judges.

Appellant Frank Calvo appeals from a summary judgment granted in favor of the Los Angeles Unified School District and various of its personnel officers. Calvo contends that on three separate occasions he became a probationary teacher with the school district, and that each time the school district subsequently demoted him to substitute teacher status without affording him the notice and hearing required before a probationary teacher can be dismissed. Cal. Educ. Code § 13443.[1]

The district court concluded that Calvo was never promoted from substitute to probationary teacher status. Hence, the school district never demoted Calvo and the school district's actions never triggered the procedural protections of section 13443. We affirm.

Calvo claims that the school district first demoted him from probationary to substitute status in 1964. The record indicates, however, that Calvo's contract for the previous years, and the school district's correspondence with him during this period, specified that he was not a probationary teacher. Those documents further noted that he could become one only if he passed the district's qualifying examination and was selected from the district's eligibility list.

Calvo concedes that he fulfilled neither requirement in 1964. His employment during that year was solely as a substitute, and the school district did not demote him from probationary to substitute status. The procedural protections of section 13443, therefore, were never called into play.

1966

Calvo also claims that he became a probationary teacher in 1966, and that he was subsequently demoted to substitute status without notice and a hearing. Once again, however, the evidence shows that Calvo never became a probationary teacher, and that his subsequent employment as a substitute was not a demotion.

Calvo argues that Cal Educ. Code § 13446 automatically made him a probationary teacher in 1966, whether or not the district recognized the change in status. Section 13446 changes the status of "temporary" employees to "probationary" employees if they have not been dismissed during the first three months of the school term. Calvo argues that section 13446 converted his status to probationary because he worked as a long-term substitute from September 1965 to February 1966.

Section 13446, however, did not apply to Calvo because he was a substitute and not a temporary teacher. The Education Code clearly distinguishes between these two classifications. See Cal Ed. Code § 13337. A temporary teacher may become a probationary teacher under section 13446, but no such provision is made for substitute teachers.

Again, Calvo never became a probationary teacher, and, therefore, was not demoted when he was hired as a substitute.

Calvo next argues that he became a probationary teacher by virtue of Cal. Educ. Code § 13336.5 because he taught as a long-term substitute during the school years 1971 - 72 and 1972 - 73. The statute's language, however, refutes this assertion.

Section 13336.5, effective October 1971 through July 1973, provided that a teacher substituting at least 75% of one school year in a class or classes that would have been taught by one person absent from service "shall be deemed to have been a probationary employee during the entire school year in which he so teaches . . . and shall be deemed to have served a complete school year as a probationary employee . . ." However, "[n]o such employee shall be entitled to the benefits of this section unless he has also met the requirements, if any, including selection for probationary status from the appropriate eligibility list, established as a result of competitive examination, by the governing . . ." Id. (emphasis added).

Although Calvo had passed the qualifying examination in 1971, he was never selected for probationary status from the school district's eligibility list. Thus, section 13336.5 did not make him a probationary teacher and, therefore, his employment the following years as a substitute teacher was not a demotion.

Since Calvo never became a probationary teacher, he can not complain that he was demoted without the proper procedural protection. The trial court, therefore, correctly found his claims meritless.

AFFIRMED.

FOOTNOTES

.1. Under the California law, appellant's status is governed by the statutes in effect at the time of his hiring. Balen v. Peralta Jr. College Dist., 11 Cal. 3d 821, 830, 114 Cal. Rptr. 589, 523 P.2d 629 (1974), quoted in Santa Barbara Federation of Teachers v. Santa Barbara High Sch. Dist., 76 Cal. App. 3d 223, 228 n. 3, 142 Cal. Rptr. 749 (1977).

C

FILED
JULY 27, 1982

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK J. CALVO,
Plaintiff-Appellant,

No. 81-5306

vs.

ORDER

LOS ANGELES UNIFIED
SCHOOL DISTRICT, et al.,
Defendants-Appellees.

Before: HUG, TANG, and PREGERSON, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en ban suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.